

STATE OF COLORADO
Department of State
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Re: CCEG complaint against Colorado Cab under lobbying regulation law

Dear Ms. Taylor and Mr. Gessler:

In response to the complaint submitted by Colorado Citizens for Ethics in Government (CCEG), and after consideration of the response of Colorado Cab Company, LLC (Colorado Cab), the reply of CCEG, and our review of the applicable statutory and case law, this office has determined that it will undertake an investigation to determine if Colorado Cab violated § 24-6-307, C.R.S., concerning the employment of unregistered persons to engage in lobbying, and whether Colorado Cab drivers violated § 24-6-302 and § 24-6-303 by failing to register and report as professional lobbyists.

Background

On April 3, 2007, Chantell Taylor, Director of CCEG, filed a verified complaint with the Secretary of State on behalf of CCEG alleging that Colorado Cab violated the lobbying regulation law under Title 24, Article 6, Part 3, Colorado Revised Statutes. The complaint stated that Colorado Cab "appears to have violated state law by offering monetary consideration to drivers, who are not registered lobbyists, for lobbying state legislators to oppose a pending bill". The complaint requested an investigation and appropriate enforcement action. On April 4, 2007, the Secretary of State by letter requested Colorado Cab to submit a written response to the complaint.

On April 11, 2007, CCEG submitted a letter to the Secretary of State requesting that the Secretary accept affidavits from cab drivers and keep their identities confidential because they are fearful of retribution. CCEG's letter asserted that the Secretary could deny public inspection of such affidavits under § 24-72-204 (2) (a) (I) of the Colorado Open Records Act, which permits a custodian of records to deny public inspection of "investigatory files compiled for any ... law enforcement purpose".

On April 12, 2007, attorney Scott E. Gessler filed a response on behalf of Colorado Cab arguing that no violations of the law had occurred.

On April 18, 2007, the Secretary of State, by letter, requested from CCEG, a written reply to the legal and factual issues raised by Colorado Cab's response. The Secretary of State's letter asked that the reply address a series of specific questions that arose from the Secretary of State's review of Colorado Cab's response. On April 25, 2007, CCEG submitted a reply to Colorado Cab's response.

Analysis

Based on CCEG's complaint, Colorado Cab's response, and CCEG's reply, the Secretary of State concludes that the complaint alleges three possible violations of the law by Colorado Cab and/or the drivers for Colorado Cab.

- a. That Colorado Cab violated § 24-6-307, C.R.S., concerning the employment of unregistered persons to engage in lobbying.
- b. That Colorado Cab drivers violated § 24-6-302 and § 24-6-303 by failing to register and report as professional lobbyists.
- c. That Colorado Cab unlawfully induced the drivers to violate the lobbying regulation law.

Possible violation of § 24-6-307, C.R.S.

There are several elements that must be established to show a violation of § 24-6-307. According to the statute, it is unlawful for any person:

- a. to employ for pay or any consideration,
- b. or pay...any consideration to
- c. or agree to pay any consideration to
- d. an individual to engage in lobbying
- e. who is not registered. (Emphasis added).

Thus, in order to prove a violation of this statute, a person must (a) employ, (b) pay, or (c) agree to pay consideration to an unregistered individual to engage in lobbying. A mere *offer* to pay an unregistered person to engage in lobbying is insufficient to establish a violation, because a mere offer does not constitute (a) employment, (b) actual payment, or (c) an agreement. For there to be an "agreement", there must be both offer and acceptance. Similarly, "employment" is a form of agreement that requires both offer and acceptance, since someone cannot be unilaterally employed by another without consent. Thus, if Colorado Cab merely *offered* consideration to cab drivers to engage in lobbying, that fact alone would be insufficient to establish a violation of § 24-6-307.

Possible violation by cab drivers for acting as unregistered professional lobbyists.

Section 24-6-301(6), C.R.S., defines a "professional lobbyist" as any individual who engages himself or is engaged by any other person for pay or for any consideration for lobbying. Any person satisfying this definition is required to register with the Secretary of State's office

pursuant to § 24-6-303, C.R.S., and to file disclosure statements with the Secretary of State's office pursuant to § 24-6-302, C.R.S. Therefore, if any cab driver accepted payment or other consideration for lobbying, such driver may have been required to register and report as a professional lobbyist. CCEG stated that it believes that none of the Colorado Cab drivers are registered as professional lobbyists.

*Possible violation by Colorado Cab for inducing cab drivers
to violate lobbying regulation law.*

As clarified by its reply on April 25, CCEG alleges that Colorado Cab is criminally liable under the theory of complicity pursuant to § 18-1-603, C.R.S., which provides, "A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense."

The lobbying regulation law sets out various specific violations and the enforcement remedies available. However, the lobbying regulation law provides no authority for an enforcement action based on the theory of complicity under § 18-1-603. Enforcement remedies are limited to those stated in the lobbying regulation law itself. This conclusion is supported by *People v. Bagby*, 734 P.2d 1059 (Colo. 1987), in which the Colorado Supreme Court addressed a similar question involving the Liquor Code. There the Court stated:

These features of the Liquor Code lead to the conclusion that in adopting this comprehensive regulatory program, with detailed attention to various types of punishment for different violations thereof, the General Assembly intended that, unless otherwise indicated by specific provisions of the Liquor Code, prosecutorial discretion for violations of the Liquor Code is limited to the specific punishment provisions set forth in the Liquor Code itself for such conduct.

Therefore, the Secretary of State has no authority to pursue an enforcement action based on § 18-1-603.

Conclusions

For the reasons explained above, of the three types of violations alleged in the complaint, it appears that two types of violations could have merit, but only if there is a sufficient factual basis:

- a. That Colorado Cab violated § 24-6-307, C.R.S., concerning the employment of unregistered persons to engage in lobbying.
- b. That Colorado Cab drivers violated § 24-6-302 and § 24-6-303 by failing to register and report as professional lobbyists.

In order to determine whether there is a sufficient factual basis for these two types of violations, this office will conduct an investigation in accordance with § 24-6-305 (2) (c), C.R.S., which provides as follows:

**24-6-305. Powers of the secretary of state - granting and revoking of certificates
- barring from registration - imposition of fine - notification of substantial violation.**

(2) In addition to any other powers conferred by this section, the secretary of state may:

(c) On his own motion or on the verified complaint of any person, investigate the activities of any person who is or who has allegedly been engaged in lobbying and who may be in violation of the requirements of this part 3;

Decision

1. The Secretary of State will conduct an investigation pursuant to § 24-6-305(2)(c), C.R.S., to determine if Colorado Cab violated § 24-6-307, C.R.S., concerning the employment of unregistered persons to engage in lobbying, and whether Colorado Cab drivers violated § 24-6-302 and § 24-6-303 by failing to register and report as professional lobbyists. The Secretary will assign an investigator, who will begin the investigation by interviewing CCEG and the cab drivers identified by CCEG.
2. Records created or collected during the Secretary's investigation, including investigator's notes and any affidavits of cab drivers that may be provided by CCEG, will be treated by the Secretary of State as confidential under § 24-72-204 (2) (a) (I) of the Colorado Open Records Act, which permits a custodian of records to deny public inspection of investigatory files compiled for law enforcement purpose. However, the Secretary cannot guarantee that the identities of cab drivers who are interviewed or who provide affidavits will be kept confidential, since any person requesting investigatory records may challenge the Secretary's denial of inspection in court.
3. Upon conclusion of the investigation, the Secretary of State will take appropriate action as may be warranted and authorized under the lobbying regulation law.

Respectfully,



William A. Hobbs
Deputy Secretary of State